IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Indictment No. 13393

UNITED STATES OF AMERICA

v.

ROSCOE DENMARK

STATEMENT AS TO JURISDICTION

In compliance with Rule 37(a)(1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis on which the Supreme Court has jurisdiction on appeal to review the orders of the District Court in both causes dismissing the indictments.

OPINION BELOW

The order of the District Court has not yet been reported. A copy thereof is annexed hereto as Appendix A. A copy of the amendatory order is annexed hereto as Appendix A-1.

JURISDICTION

The order of the District Court dismissing the indictment was entered on February 25, 1953. An amendment to the order was entered on March 26,

1953. The jurisdiction of the Supreme Court to review on direct appeal the order of the District Court dismissing the indictment, based on a construction and the unconstitutionality of the statute upon which the indictment is founded, is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a) F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in aid of its power to prohibit the shipping of gambling machines in interstate commerce, Congress may require dealers in such machines to register with the Attorney General and report all sales, including intrastate deliveries.

2. Whether the requirement that the dealer register with the Attorney General the addresses of his places of business "in such district" renders the statute void for vagueness.

STATEMENT

On May 13, 1952 an indictment in four counts charging violations of Section 3 of the Act of January 2, 1951 (Appendix B, *infra*) was returned against defendant in the District Court for the Southern District of Georgia. Count one charged defendant with engaging in the business of a dealer in gambling devices without having registered with the Attorney General his name, trade name, and addresses of his places of business and the remaining three counts with having failed to file reports of the sales and deliveries of gambling devices, as required by the Statute.

Defendant's motion to dismiss the indictment was granted. In its opinion, as amended, the District Court noted that "no allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales." The Court held that "The statute under consideration does not apply to intrastate transactions even should it be deemed constitutional", and further "that the Statute involved in so far as it undertakes to regulate purely intrastate transactions goes beyond the power of Congress under the commerce clause of the Constitution."

The Court also held that the requirement in Section 3, that a dealer register with the Attorney General his place of business "in such district" rendered the statute "too vague, indefinite and uncertain in failing to definitely and clearly designate what is meant by the language 'In such district'".

THE QUESTION IS SUBSTANTIAL

1. While recognizing the validity of the Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. 1171-1177, Supp. V) in so far as it bans from shipment into interstate commerce gambling devices destined for states which have not enacted laws exempting themselves from its scope, the decision below seriously hampers its enforcement by holding that the registration and reporting requirements of Section 3 cannot constitutionally be applied to a dealer in gambling devices who does not himself engage in an actual interstate shipment. The decision in the

instant case goes beyond that in *United States* v. *Five Gambling Devices*, No. 558 this Term, presently before the Supreme Court on direct appeal from a decision of the District Court for the Middle District of Tennessee dismissing libels for forfeiture of gambling devices sold by unregistered dealers. There the Court had assumed the validity of the registration provisions, holding merely that Congress had no power to provide for the forfeiture of devices which were not at the time of seizure in the stream of interstate commerce. The instant decision holds the registration and report sections unconstitutional as applied to a dealer who does not himself directly make interstate sales. We submit that the instant decision represents an unduly narrow construction on the Congressional power over interstate commerce, and is contrary to the decisions of this Court.

Congress has the power to ban from interstate commerce articles injurious to public health, morals or welfare, and may aid state law enforcement by prohibiting the use of the channels of interstate commerce to contravene state policy. *United States* v. *Carolene Products Co.*, 304 U.S. 144; *Kentucky Whip and Collar Co.* v. *Illinois Central Railroad Co.*, 299 U.S. 334; *Whitfield* v. *Ohio*, 297 U.S. 431; *Lottery Case*, 188 U.S. 321. And in exercising its delegated power under the commerce clause, Congress regulates "those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it, as to make regulation of

them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate commerce". *Wickard* v. *Filburn*, 317 U.S. 11, 124. See also *United States* v. *Walsh*, 331 U.S. 432; *United States* v. *Frankfort Distilleries*, 324 U.S. 293; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *United States* v. *Darby*, 312 U.S. 100, 117-118.[1] One such implementing provision is the requirement that all persons engaged in a particular business, register and file reports so that the transactions which might be subject to federal control can be identified. *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U.S. 194; *Shapiro* v. *United States*, 335 U.S. 1, 32-33. See also *United States* v. *Kahriger*, No. 169, decided this Term, slip op. p. 9; *Sonzinsky* v. *United States*, 300 U.S. 506-513; *Nigro* v. *United States*, 276 U.S. 332, 350-352; *Arrow Distilleries Inc.* v. *Alexander*, 109 F. 2d. 397 (C.A. 7). The requirements of registration and reporting need not be limited to those dealers who engage in interstate transactions, but may encompass all transactions, knowledge of which might facilitate the administration of the Act. "The requirement for records even of the intrastate transactions is an

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[1] The Supreme Court recently observed in *United States* v. *Kahriger*, No. 167, decided this Term, slip op. p. 7: "* * * Where federal legislation has rested on other congressional powers, such as the Necessary and Proper Clause or the Commerce Clause, this Court has generally sustained the statutes, despite their effect on matters ordinarily considered state concern. Where federal power to regulate is found, its exercise is a matter for Congress * * *."

appropriate means to the legitimate end". *United States* v. *Darby*, 312 U.S. 100, 125.[2]

The legislative history shows that trading in gambling devices was known to be interstate in nature and thus an appropriate subject of federal concern. The manufacture of slot machines is concentrated in the area of Chicago, Illinois, and the machines are distributed throughout the country (S. Rep. 307, 82d Cong., 1st Sess. p. 14). In a report on the bill (H. Rep. No. 2769, 81st Cong., 2d Sess., p. 4) it was stated that those favoring the legislation "pointed, particularly, to the existence of nation-wide crime syndicates which are securing a large share of their revenue from the operation of slot machines and other gambling machines."

In addressing itself to the control of this problem, Congress evidently felt that among manufacturers and dealers in such machines, interstate and intrastate transactions were so commingled (or their nature so obscured) that registration of and reports from all dealers and manufacturers were necessary

[2] The Supreme Court in addressing itself to a contention that a provision of the Interstate Commerce Act which required carriers doing both interstate and intrastate business to render accounts of all of their business was beyond the power of Congress as a regulation of intrastate commerce, said in *Interstate Commerce Commission* v. *Goodrich Transit Company*, *supra* (224 U.S. 194, 211): "* * * The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business."

for any effective regulation of the interstate aspects of the business. The devious processes through which gambling devices get into interstate commerce and through which they are transported to ultimate consignees in distant states are difficult of detection, and their nature as interstate or intrastate commerce can be obscured by straw transactions and intermediate sales, both before and after interstate transit. In order to trace the chain of acts by which a gambling device is transported from its place of origin in Illinois to its ultimate point of destination, each transaction must be identified by a system of registration and reporting, to give effect to the policy of the Act. In addressing itself to analogous legislation banning the shipment of adulterated food in interstate commerce the Supreme Court said in *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 57, "It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the state." Similarly here, if the registration and reporting requirements of Section 3 of the Act were construed narrowly to apply only to actual shipments of gambling devices across state lines, and to exempt all transactions before and after such transit, the intendment of the Act would be rendered nugatory by calculated evasions.

2. The District Court also held that Section 3 "is too vague, indefinite and uncertain in failing to definitely and clearly designate what is meant by

the language 'In such district' ", in that portion requiring registration with the Attorney General of places of business "in such district". The bill as originally introduced in committee (S. 3357, 1st Cong., 2d Sess.) provided in its third section that "* * * every manufacturer of and dealer in gambling devices shall register with the collector of internal revenue for each district in which such business is to be carried on, his name or trade name, the address of his principal place of business, and the addresses of his places of business *in such district*" [italics supplied]. In committee the provision for registration with "the collector of internal revenue for each district" was amended to provide for registration "with the Attorney General", but the phrase "in such district" at the end of the same sentence was not deleted.

The statute clearly requires that each manufacturer and dealer in gambling devices must register with the Attorney General of the United States his name or trade name, the address of his principal place of business, and the address of any of his other places of business. The reference to the "district" doubtless meant that for purposes of administering the Act, reporting districts would be established by the Department of Justice. This has been done by Department of Justice Order No. 4173, 16 F.R. 3509 (1951) (Appendix C, *infra*) promulgated to implement the Act, which creates two reporting districts,—one for manufacturers and dealers in gambling devices having places of business in Illinois, the other for those having places of

business elsewhere. A person subject to the Act would therefore not be in any doubt as to where to file the reports.

It is submitted that the decision of the District Court is erroneous and that the questions presented by this appeal are substantial ones which should be settled by the Supreme Court.

Respectfully submitted,

(S.) ROBERT L. STERN,
Acting Solicitor General.

Dated: March 19, 1953.

APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

Indictment No. 13393

Vio: Title 15, U.S.C., Sec. 1173

UNITED STATES OF AMERICA

v.

ROSCOE DENMARK

An indictment in four counts was returned against Roscoe Denmark charging violations of Title 15 USC 1173. The first count charges that defendant was a dealer in gambling devices and failed to register with the Attorney General of the United States. The remaining counts of the indictment charge that the defendant sold and delivered gambling devices to the persons named in the respective counts within the Savannah Division of the Southern District of Georgia and did not file inventories and records of the sales with the Attorney General.

By motion to dismiss the indictment timely filed and presented, the defendant contends that Title 15 USC 1173 is unconstitutional as being in violation of the Tenth Amendment to the Constitution in so far as it undertakes to regulate transactions purely local in their nature and entirely intrastate and transactions which do not directly affect interstate commerce. It is further contended by the defendant in his motion to dismiss that Title 15 USC 1173

is too vague, indefinite, and uncertain to be enforceable, particularly with reference to the language "in such district".

As this opinion dealing with the constitutionality of, and application of Title 15 USC 1173 disposes of the case, no discussion is had as to the other grounds of the motion.

The indictment and all counts thereof is based on Title 15 USC 1173, (Act of Congress of January 2, 1951.) Section 1172 of this Act prohibits the transportation of gambling devices in interstate commerce. It was passed pursuant to the constitutional power of Congress to regulate interstate commerce. Being penal in character it must be strictly construed.

That Congress has the power to prohibit and regulate the transportation of gambling devices in interstate commerce is clear, and it may regulate to the extent of affecting such intrastate transactions as directly affect interstate commerce (but to regulate transactions purely intrastate or which only indirectly affect interstate commerce would be exceeding the powers of Congress and would render such action unconstitutional. To come within the powers of Congress to regulate intrastate transactions, such transactions must be such as substantially and directly affect interstate commerce, and to extend the Statute here under consideration to purely intrastate transactions would give to Title 15 Section 1173 of the Act an effect beyond the constitutional powers of Congress. While the following decisions are not binding on me, I think their reasonings are sound.

In the case of United States vs. 5 Gambling De-

vices, Libel for Forfeiture, in the Northern District of Georgia, Judge Sloan, in considering the Statute here involved, ruled: "It is neither shown, or contended that purely intrastate transactions in gambling devices in any way interfere with or obstruct the regulation of such devices in interstate commerce, and to extend the Act to purely intrastate transactions gives to the Act an effect beyond the constitutional power of Congress. The Act does not apply to intrastate transactions."

The Statute under consideration must be valid, if at all, under the Commerce Clause of the Constitution. The power of Congress under this clause is limited to matters directly affecting interstate or foreign commerce. "The power of Congress under the commerce clause is limited to matters directly affecting interstate or foreign commerce, and can not extend to matters the effect of which, whatever its extent, is indirect." James Walter Carter v. Carter Coal Co. et al., 298 U.S. page 238 (21), see page 297.

In the case of United States of America v. 15 Mills Blue Bell Gambling Machines, et al., Libel in Rem, in the Middle District of Georgia, Judge Conger, in considering the Statute here under consideration ruled:

"The fifth defense is predicated on the theory that the Act under which these proceedings are brought seeks to regulate intrastate commerce, which is beyond the power of Congress to do. This defense is sustained," and ruling that the Statute involved was unconstitutional for this reason, and for the further reason that it was too vague, indefinite, and uncertain because of the language "in

such district" contained in the Statute, there being no named or defined district or area to which the words "in such district" could refer.

It is not contended by the counsel for the United States that the defendant was a dealer in interstate commerce, and it is conceded that none of the machines allegedly sold by the defendant were ever transported in interstate commerce and that all of his alleged transactions were had wholly within the State of Georgia. Interstate commerce was not involved and not directly or indirectly affected by the alleged intrastate transactions on the part of the defendant. The Statute under consideration does not apply to intrastate transactions even should it be deemed constitutional.

It seems clear to the Court that the Statute involved in so far as it undertakes to regulate purely intrastate transactions goes beyond the power of Congress under the commerce clause of the Constitution.

The Court is also of the opinion that the Statute is too vague, indefinite, and uncertain in failing to definitely and clearly designate what is meant by the language "In such district", and being a criminal statute it must be strictly construed.

In accordance with the foregoing opinion, it is

CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the motion of the defendant to dismiss the indictment and all counts thereof be, and the same hereby is, sustained and the indictment and all counts thereof is hereby dismissed.

This the 24 day of February, 1953.

(S.) F. M. SCARLETT,
United States District Judge.

Endorsement: Criminal Indictment No. 13393. Opinion and Order of Court Dismissing Indictment. Filed in Clerk's Office: February 25, 1953. Eugene F. Edwards, Deputy Clerk.

APPENDIX "A-1"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

No. 13393

Vio: Title 15, U.S.C., Sec. 1173

UNITED STATES OF AMERICA

v.

ROSCOE DENMARK

Whereas, this Court on the 25th day of February, 1953, entered judgment in the above-entitled cause sustaining the defendant's motion to dismiss the indictment and dismissing said indictment; and

Whereas, said judgment recites in the first part of the second paragraph on page three thereof, the following, to-wit:

"It is not contended by the counsel for the United States that the defendant was a dealer in interstate commerce, and it is conceded that none of the machines allegedly sold by the defendant were ever transported in interstate commerce and that all of his alleged transactions were had wholly within the State of Georgia."

It being made to appear to the Court that the wording quoted is an incorrect statement as to what transpired, and counsel for the defendant agreeing,

IT IS THE ORDER AND JUDGMENT OF THE COURT that the judgment heretofore entered in said cause be, and the same is, hereby modified by deleting therefrom the above-quoted words; and that the following words be inserted in lieu thereof as a part of said judgment, to-wit:

"No allegation is made in the indictment as to any of the sales being interstate commerce, and the Assistant District Attorney conceded that there were no interstate sales."

Let this order be filed of record.

This 26th day of March, 1953.

(S.) F. M. SCARLETT,
United States Judge.

Endorsement: Criminal Indictment No. 13393 Order Amending Judgment and Opinion of Court. Filed in Clerk's Office: March 26th, 1953. Eugene F. Edwards, Deputy Clerk.

APPENDIX "B"

The Act of January 2, 1951, 64 Stat. 1134 (15 U.S.C. 1171-1177, Supp. V), provides in pertinent part as follows:

That as used in this Act—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essen-

tial part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated, it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

* * * * *

SEC. 2. It shall be unlawful knowingly to transport any gambling device to any place outside of such State, the District of Columbia, or possession; Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

* * * * *

Sec. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were the assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein pro-

vided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

* * * * *

Sec. 5. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in Section 1151 of title 18 of the United States Code or within the special maritime and territorial jurisdiction of the United States as defined in Section 7 of title 18 of the United States Code.

* * * * *

Sec. 6. Whoever violates any of the provisions of sections 2, 3, 4 or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 7. Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the pro-

ceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: *Provided*, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

* * * * * *

APPENDIX "C"

The regulations promulgated pursuant to 5 U. S. C. 22 by the Attorney General of the United States to implement the Act of January 2, 1951 are as follows (16 F.R. 3509, 28 C.F.R. 3):

The following regulations are hereby prescribed for carrying out certain provisions of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress)

Sec. 3.1 *Registration and filing of reports by*

manufacturers of and dealers in gambling devices having places of business in Illinois. Manufacturers of and dealers in gambling devices having places of business in the State of Illinois shall (a) register as required by Section 3 of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress) with the Attorney General at the office of the United States Attorney, 219 South Clark Street, Chicago, Illinois, and (b) file the monthly reports required by that section with the Attorney General at the same place.

Sec. 3.2 *Registration and filing of reports by manufacturers of and dealers in gambling devices having places of business in States other than Illinois.* Manufacturers of and dealers in gambling devices having places of business in States other than the State of Illinois shall (a) register as required by section 3 of the said act of January 2, 1951, with the Attorney General at the Department of Justice Building, Washington, D. C., and (b) file the monthly reports required by that section with the Attorney General at the same place. The term "States" as used in this section includes Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam.

Sec. 3.3 *Seizures.* The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors and agents of the Federal Bureau of Investigation of the Department of Justice are hereby authorized and designated to make seizures of gambling devices under the said act of January 2, 1951.

Sec. 3.4 *Custody and Forfeiture.* All gambling devices seized pursuant to section 3.3 of this order shall be held for, or turned over to, the United States marshal for the district in which the seizure is made. Other than the authority granted in section 3.3 of this order, United States marshals are hereby authorized and designated as the officers to perform the various duties with respect to seizures and forfeitures of gambling devices under the said act of January 2, 1951, as are imposed upon collectors of customs or any other persons with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws.

The Attorney General will perform, with respect to the seizure and forfeiture of gambling devices under the said act of January 2, 1951, the functions and duties now performed by the Secretary of the Treasury in regard to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws.

This order shall become effective on the date of its publication in the Federal Register. The regulations prescribed by the order are necessary for carrying out certain provisions of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress), which became effective upon the date of its approval. Compliance with the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) with respect to notice of proposed rule making and delayed effective date is impracticable and contrary to the public interest in

this instance because such compliance would unduly delay and impede the administration and enforcement of the said act.

(R.S. 161; secs. 3 and 7, Pub. Law 906, 81st Cong.)

(S.) J. HOWARD MCGRATH,
Attorney General.

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